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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

ARLIE COX,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

No. 1126

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit,

and

BRIEF IN SUPPORT THEREOF.

ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.

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Cases Cited.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for writ of certiorari from the Circuit Court of Appeals for the Seventh Circuit. The defendant, Cox, was a farmer living at Monticello, Illinois. He was indicted by the federal grand jury in the District Court

of the United States for the Eastern District of Illinois, at Danville, Illinois, on the 7th day of September, A. D. 1944. The indictment contained six counts charging the defendant with violation of Section 1315.801 of Ration Order No. 1A issued November 6, 1942, by the administrator of the Office of Price Administration under the authority conferred upon him pursuant to the provisions of Section 633, Title 50, App., U. S. Code, and Section 2.8 of General Ration Order No. 8 issued March 25, 1943, effective April 15, 1943, by the Office of Price Administration, which was then and there an agency of the United States of America and empowered to issue said Ration Order No. 8 pursuant to Executive Order No. 9125, Directive No. 1, of the War Production Board, and Food Directive No. 3, issued by the Secretary of Agriculture under and pursuant to the provisions of Section 2 (a) (8) of the Second War Powers Act of 1942, Title 50, App., Section 633, U. S. Code.

2.

THE PROCEEDINGS IN THE TRIAL COURT.

The indictment consists of six counts. The first three counts charge the petitioner, Arlie Cox, with a violation of Section 1315.801 of Ration Order No. 1A, issued November 6, 1943, by the Administrator of the Office of Price Administration under the authority conferred upon him pursuant to the provisions of Section 633, Title 50, App., U. S. Code, and the last three counts charge the petitioner, Arlie Cox, with a violation of Section 2.8 of General Ration Order No. 8, issued March 25, 1943, effective April 15, 1943, by the Office of Price Administration, which was then and there an agency of the United States of America and authorized to issue said Ration Order No. 8, pursuant to Executive Order No. 9125, Directive No. 1, of the War Production Board, and Food Directive No. 3, issued by the Secretary of Agriculture under and pursuant to the powers

of Section 2 (a) (8) of the Second War Powers Act of 1942, Title 50, App., Section 633, U. S. Code.

A trial was had and the jury convicted the petitioner on all counts.

The first count in the indictment charges, in substance, that Arlie Cox did willfully and knowingly make a transfer to Roy W. Jones of certain new tires, which said tires were identified by serial numbers 4U803522, 4U729555, 4U671024, and 4U1193877, said transfer not being pursuant to the provisions of Ration Order No. 1A or an order, authorization or regulation issued by the War Production Board.

The second count in the indictment charges, in substance, that Arlie Cox committed the same violation as set up in Count One, by making a transfer of certain new tires, identified by serial numbers 303L2630 and 303L2130 to William Lucker.

The third count in the indictment charges, in substance, that Arlie Cox committed the same violation as set up in Count One, by making a transfer of certain new tires, identified by serial numbers 407T4459, 264T3159, 393E6119 and 261T6959, to Wayne Hanselman.

The fourth count in the indictment charges, in substance, that Arlie Cox did willfully and knowingly on or about the 1st day of January, A. D. 1944, sell to one Roy W. Jones a certain rationed commodity, to wit: four 700 x 16 Appollo Supreme Grade 1 tires, bearing serial numbers 4U803522, 4U729555, 4U671024, and 4U1193877, not pursuant to or in accordance with the provisions of a ration order therefor, the said defendant-appellant then and there well knowing that he had not acquired said rationed commodities in accordance with the rules and regulations issued by the Office of Price Administration and was without right and authority to sell the same.

The fifth count in the indictment charges, in substance, that the same violation as set up in Count Four was committed by Arlie Cox in the sale of certain tires to William Lucker, said tires identified in Count Two.

The sixth count in the indictment charges, in substance, that the same violation as set up in Count Four was committed by Arlie Cox in the sale of certain tires to Wayne Hanselman, said tires identified in Count Three (T. of R., pp. 2-6; Rec. pp. 4-10).

Arlie Cox entered a Plea of Not Guilty October 11, 1944, to the indictment (T. of R. p. 7; Rec. p. 12).

On October 3, A. D. 1944, the Court overruled the Motion to Quash Indictment and denied the Motion to Compel United States Attorney to Elect (T. of R. p. 11; Rec. p. 22).

The Jury was empaneled to try this case (T. of R. p. 15; Rec. pp. 30-31) and on the same day, before the Jury heretofore empaneled, and the trial commenced. At the conclusion of all the evidence the petitioner, Arlie Cox, moved for a directed verdict, which was denied and to which ruling of the court, the petitioner, by his counsel, duly excepted (T. of R. p. 97; Rec. p. 158).

The court then instructed the Jury (T. of R. pp. 71-76; Rec. pp. 124-133).

The Judge ordered the Jury to remain in the courtroom and ordered the courtroom cleared, not permitting the Judge to retire (T. of R. p. 76; R. p. 133).

The Judge returned in open court the following verdict:

> "We, the Jury in this case, find the defendant, Arlie Cox, Guilty in manner and form as charged in the indictment in said case, and each count thereof" (T. of R. p. 98; Rec. p. 160).

Thereafter, on the 14th day of October, A. D. 1944, petitioner filed his Motion in Arrest of Judgment (T. of R. p. 99; Rec. pp. 161-162).

Thereafter, on the same day, petitioner filed his Motion for New Trial (T. of R. pp. 100-102, 163-167).

Thereafter, on the 18th day of October, 1944, Motion in Arrest of Judgment and Motion for a New Trial were overruled, to which said rulings of the court the petitioner, by counsel, duly excepted (T. of R. pp. 104-115; Rec. pp. 171 and 189).

3.

THE EVIDENCE AND TRIAL.

Arlie Cox was shown by the evidence to be a farmer or livestock dealer living near Monticello, Illinois. All of the witnesses testifying for the government were farmers. All of them testified that they owned farm implements, trucks and tractors. The evidence showed that all of the witnesses who testified on behalf of the government had been previously indicted by the United States Grand Jury for the Eastern District of Illinois, had been arraigned and pleaded guilty and paid a fine. The ration regulations in force at the time of the alleged offense prohibited the transfer of "new" Grade 1 automobile tires.

Throughout the reception of the evidence and the instructions to the jury the court and witnesses used the word **"new"** with reference to the tires in its ordinary accepted English meaning.

The word **"new,"** as defined by the Office of Price Administration, was as follows:

> 1315.201 (19) "New" as applied to tires and tubes means a tire or tube that has been used less than one thousand miles.

Plaintiff's counsel offered to tender an instruction to the jury defining the word "new" in the language of the Office of Price Administration, but this court refused. Likewise, the Circuit Court of Appeals in its decision has considered the word "new" in a similar manner.

In the reception of the evidence several tires were received which bore numbers and designations at variance without the numbers written on the tires (T. of R. p. 75).

The District Court and Circuit Court of Appeals have held that this variance was not a substantial variance. We contend that it was a substantial variance, because if the situation was reversed a citizen attempting to obtain tires from the Office of Price Administration would be bound by the numbers on the tires which he had on his automobile.

The court in his instructions to the jury refused to define what constitutes "wilful" violation of the ration regulations. The indictment alleged and the regulations required a "wilful and knowing" violation. The court invaded the province of the jury by narrowing the issue to a question of whether or not there had been a sale of tires without ration certificates entirely omitting the requirement that the violation be a wilful knowing violation.

4.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under Section 240A of the Judicial Code (28 USC 347). The Circuit Court of Appeals has in this case decided federal questions which have not been and should be settled by this court [Sup. court Rule 38 (5) (B) as amended by the Act of February 13, 1925]. Judgment was entered in this case by the United States Circuit Court of Appeals for the Seventh Circuit on March 5, 1945.

5.

QUESTIONS PRESENTED.

1. The first question presented is sufficiency of the indictment. We refer to the general rule that an indictment need not negative exceptions unless the statute or regulations are so drawn that it is necessary to do so in order to state an offense.

2. The second question presented is whether the defendant was deprived of a fair and impartial trial or whether the court so violated the federal rules or criminal procedure by admitting evidence at variance with the allegations of the indictment over the objection at variance to the indictment and the evidence and that the defendant was deprived of a fair and impartial trial.

3. The third question presented involves a question which has not been decided by this court in connection with rationing regulations which should be decided, namely, what constitutes a wilful and knowing violation of ration regulations? The word "wilful" is used in a great many statutes and has been considered by the court in connection with income tax violations, postal violations and many others, but no decision of this court has been rendered in connection with the term "wilful and knowing" violation as used in the ration regulations.

4. The fourth question presented is whether the trial court and Circuit Court of Appeals correctly instructed the jury as to what constitutes a variance, that is, a substantial variance?

5. The fifth question presented is whether the trial court erred in expressing his opinion as to the evidence and whether he invaded the province of the jury in so doing.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A substantial federal question presents itself with respect to the use of the term "wilful and knowing" violation of ration regulations. This question has not been heretofore determined by this court.

So far as petitioner is informed, this case presents for the first time the question as to whether a district court may determine as a question of law whether there is a wilful and knowing violation of ration regulations or whether it remains a fact for the jury to determine.

This court has held in Murdock v. U. S., 290 U. S. 389, 398, 78 L. Ed. 381-387, that wilfulness implied not only the knowledge of a thing, but a determination with a bad intention to omit doing it.

The provisions of the ration regulations require that there be a wilful and knowing violation in order to base a prosecution. The word "wilful" in the ration regulations assumes peculiar importance because of the fact that ration regulations are subject to so many changes. The grades of tires, the kinds of tires, the sizes of tires, the construction of tires and all of the various features of the tires are subject to regulations and thousands of regulations are issued concerning these. Then, too, General Order No. 8, which is alleged in the last three counts of the indictment, invokes not only rationed tires but many other products. Inasmuch as citizens generally acquire knowledge of ration regulations solely from newspapers and radio publicity, and inasmuch as it is presumed that citizens have knowledge of the ration regulations, it is important in criminal trials that the jury be accurately and correctly instructed. For instance, one ration regula-

tion provides that automobiles shall not be driven faster than thirty-five miles per hour, excepting in certain instances, and a penitentiary offense is provided in the event such regulation is violated; it can readily be seen that there might be a violation of such regulation on many occasions without the same being wilful.

The word "wilful" is used in so many instances in the statute that it is important to all the people that its use in the ration regulations be defined and determined, otherwise there may be a multiplicity of criminal prosecutions which are unfounded and many persons Congress never intended to be indicted might still be subject to indictment, although it is important to the American people generally that the high regard which has been held for the Government be preserved rather than undermined by having all the people at all times subject to criminal prosecution for acts which might and do occur every day in connection with ration regulations. If the court would by judicial determination define the term "wilful" in a limited way, there would be a greater safeguard for American liberty.

Another reason relied upon for the granting of writ of certiorari is the conducting of the case by the trial court both in instructions and in the reception of evidence. The trial court invaded the province of the jury and misconstrued the ration regulations and he refused to instruct the jury as to the meaning of the ration regulations and at the hearing before the Circuit Court of Appeals admitted that he did not know what were the regulations. The trial court likewise erroneously refused to quash the indictment. There are many other reasons in support of the general rule of law that the government is not compelled to allege exceptions or negative exceptions in an ordinary indictment. But in a case such as this, the gov-

ernment is in a much more favorable position to prove that the articles were not within the exceptions than is the defendant. The government is in exactly the same position in a ration regulation as it was in the enforcement of the laws relating to the transportation of gold and gold products, and in Fuller v. United States, 114 Fed. (2d) 698, it was held that certain gold products should be negatived in the indictment. Rubber products should be no different than gold products.

As was said by this Honorable Court in Yakus v. United States of America, decided March 27, 1944, and appearing in 88 L. Ed. 653:

> "It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial."

We submit that several questions have been raised in this criminal trial which ought to be decided by this court, and while we recognize that the court is overburdened with work at the present time, we believe it is important to all persons that the questions raised in this petition be decided by this Honorable Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 8707, The United States of America, plaintiff-appellee, v. Arlie Cox, defendant-appellant," to the end that this cause may be remanded and determined by this court as provided for by the statutes of

the United States and that the judgment herein of said Circuit Court of Appeals for the Seventh Circuit be reversed by this court, and have such further relief as to the court may seem proper.

Dated April 2, 1945.

ARLIE COX,

By ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

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No. .....

BRIEF

In Support of Petition for Writ of Certiorari.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals has not yet been reported but was decided on March 5, 1945.

JURISDICTION.

1. The date of the judgment to be reviewed is March 5, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Section 240A of the Judicial Code (28 U. S. C. 347).

STATEMENT OF THE CASE.

A statement of the case has already been made in the preceding petition which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

1. The court erred in holding the indictment sufficient.

2. The district court erred in the reception of evidence and instructions to the jury.

3. The court specifically erred in failing to define a "wilful" violation of a ration regulation and instructed the jury that a case is made out by simply proving a violation.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A.

The Indictment Is Insufficient to Charge a Violation of Federal Law.

1. The regulations of the Office of Price Administration are changed from time to time, from day to day. A presumption that the accused knows the regulations are different than a presumption that an alleged violation was wilful and knowing more than knowledge of the regulation is required to make a wilful violation. "**The law under which one accused and tried for crime should be fixed and uniform in such fashion and with such permanency as to be known and understood by the Courts and the members of the profession,** and courts of last resort should not vacillate in their determination so as to change in the absence of impelling legal reasons. To be punishable as a crime the act must be a crime at the time of the act and at the time it is sought to punish therefore, and if not a crime at both times it is not punishable as a crime."

22 C. J. S., pp. 66, 67, Sec. 17.

2. When a federal criminal law is repealed the prosecution must cease.

Green v. United States, 67 F. (2d) 846;
22 C. J. S., Sec. 27, p. 80.

3. The objection that the complaint or indictment did not state an offense was first raised in the district court or trial court, next in the Circuit Court of Appeals, and now in this Court. Such questions may be raised at any time even on appeal for the first time.

Zoline, Federal Criminal Law & Procedure, Sec. 422, Note 2;

Wiborg v. United States, 163 U. S. 632, 41 Law. Ed. 289, 298;
Weems v. United States, 217 U. S. 349-362, 54 Law. Ed. 793-796, 30 Sup. Ct. Rep. 544.

"There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute, United States v. Lacher, 134 U. S. 624, 628, 33 L. Ed. 1080, 1083, 10 Sup. Ct. Rep. 625. In United States v. Chase, 135 U. S. 255, 34 L. Ed. 117, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649, the indictment was under Par. 1 of the Act of July 12, 1876, Chap. 186, 19 Stat., at l. 90, Comp. Stat., Par. 10,381, declaring "every . . . book, pamphlet, picture, paper, writing, print or other publication of an indecent character" to be unmailable, and making their deposit in the mails an offense. The question was whether to send an obscene letter by mail violated that section. The court held that the letter was not a writing within the meaning of the statute. It said (p. 261): "We recognize the value of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed by the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

71 Law. Ed., pp. 445, 446.

4. **The indictment does not negative any exceptions such as were contained in the ration regulations from time to time.** This defendant is a farmer. He was shown by the evidence without dispute to have sold farm tires, or truck tires, or implement tires. Used truck and implement tires

were excepted from rationing. No offense was alleged in the indictment without negativing these exceptions.

5. The court erred in not sustaining the motion of defendant-petition to quash the indictment in this cause, and each and every count thereof. The indictment does not charge a criminal offense of any kind or character.

Hammer v. U. S., 134 F. (2d) 592;
Burton v. U. S., 202 U. S. 344;
Fuller v. United States, 114 F. (2d) 698;
U. S. v. Wills, 36 Fed. (2d) 855.

This rule has been consistently followed and is now well established law.

Reing v. United States ex rel. Girard, 84 F. (2d) 624;
Walkner v. United States, 79 F. (2d) 269;
Stetson v. United States, 257 Fed. 689;
United States v. Moore, 11 Fed. 689;
United States v. Mandelsohn, 32 F. Supp. 622;
United States v. Union Pacific R. Co., 20 F. Supp. 665.

6. A situation relating to the rule requiring the negativing of exceptions where a license or permit to do an act is required and similar to the case at bar prevailed in Fuller v. United States, 114 Fed. (2d) 698, where the Court stated:

"Actually the Gold Reserve Act of 1934 and regulations thereunder permit certain acquisitions and transportations—among other, the acquisition and transportation of fabricated gold, metals, containing gold, unmelted gold in its natural state—without the necessity of obtaining or holding any license therefor. And ordinarily, when licenses are required, they may be and are issued by the United States assay office at New York. Hence, an acquisition or transportation of gold without and not in pursuance of, a license issued

by the Secretary of the Treasury does not violate the Act or any regulation thereunder unless such acquisition or transportation is one for which a license is required and for which no license has been issued by a United States mint or by the United States assay office at New York."

Point B.

The Defendant Was Deprived of a Fair and Impartial Trial for the Three Reasons as Follows:

1. **The Court erroneously instructed the jury:**

"Wilfulness, as used in a criminal statute, means the doing or omitting to do a thing knowingly and wilfully. It implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it."

Potter v. United States, 155 U. S. 438, 446, 39 L. ed. 214, 217, 15 S. Ct. 144;
Felton v. United States, 96 U. S. 699, 702, 24 L. ed. 875, 876;
Spurr v. United States, 174 U. S. 734, 43 L. ed. 1152, 19 S. Ct. 812;
Murdock v. United States (C. C. A. 7th), 62 F. (2d) 926, reversed in U. S. v. Murdock, 290 U. S. 389-398, 78 L. ed. 281-287.

"Accused is entitled to an instruction enlightening the jury upon the subject of wilfulness and advising it that it should consider the good faith or honest belief, if any, of the defendant, in determining whether his conduct was wilful."

Potter v. United States, 155 U. S. 446, 39 L. ed. 217, 15 S. Ct. 144.

"Whether guilty or innocent, the defendant has the right to a fair and impartial trial. He is entitled to have the jury properly and correctly instructed upon the law.

The law does not provide one method for trying innocent persons and another for trying guilty persons."

People v. Garines, 314 Ill. 413, 145 N. E. 699;
People v. Gardiner, 303 Ill. 204, 135 N. E. 422;
People v. Newman, 261 Ill. 11, 103 N. E. 589.

"An accused is entitled to be tried by an impartial and fair Judge who shall maintain his role of Judge and not assume that of prosecutor."

U. S. v. Laudani, 134 F. (2d) 847;
U. S. v. Domres, 142 F. (2d) 477;
U. S. v. Hoffman, 137 F. (2d) 416;
Hall v. U. S., 150 U. S. 76.

In the Hoffman case cited above it is held "in prosecution for wilfully failing to report for induction into army at time and place fixed in notice, the assiduity of trial judge in securing a conviction required that defendant be granted a new trial."

In the Domres case, also cited above in this connection, the court held that "an accused is entitled to be tried by an impartial and fair Judge, who shall maintain his role of judge and not assume that of prosecutor."

In the Laudani case cited above it is held that "the presiding Judge, by declining to interpose, notwithstanding defendant's protest against proper argument, gave the jury to understand that they might properly be influenced by it, and thereby committed error manifestly tending to prejudice defendant with jury, and was a proper subject of exception, and would have required a new trial if insufficiency of indictments had not put an end to the prosecution."

The attitude of the Court, in the instant case, became manifest early in the trial. The District Attorney referred, in his opening statement to the jury, to the violation with which the defendant-appellant was charged as "Black

Market." The Court overruled the objection, stating: "It is a matter for the jury. If a man does violate the regulations here he might be engaged in black market. It may stand for the present. If I find at a later time that the evidence doesn't bear that out, it may be stricken." This remark was not subsequently stricken (T. of R. 15; R. 30).

While counsel for defendant-appellant was making his opening statement to the jury he said, "These witnesses were living in fear." The District Attorney objected to the statement and the Court stated: "Sustained and the remark will be stricken from the record, and if Counsel persists in such remarks I shall have to punish him for contempt of court" (T. of R. 16; R. 32).

In the Court's charge to the Jury the Court not only undertook to instruct the Jury on questions of law, but attempted to summarize the evidence. In the summary made by the Court questions of fact which were solely within the province of the Jury to decide were decided by the Judge.

In criminal cases the court must instruct the jury on all the essential questions of law, whether requested or not.

The Court erred in refusing to charge the jury with the following instructions requested by defendant-appellant:

> "The Court instructs the Jury that under Ration Order 1-A and the Amendments thereto, you must find the defendant not guilty if you find from the evidence that the tires which were alleged to have been sold were either of the following:
>
> (a) Used solid tires.
> (b) Used implement tires.
> (c) Used tractor tires.
>
> "By virtue of an amendment to the regulation issued on the 28th day of September, 1943, the Office of Price Administration released from rationing these tires to encourage the full use of used tires of the character mentioned" (T. of R. p. 94; R. 144).

The holding in the case of U. S. v. Pepper Brothers, 142 Fed. (2d), would indicate that the law is that the amendments to the regulations set out in the indictment should have averred and not omitted.

2. **All of the following instructions tendered by the defendant were refused:**

"The Court instructs the Jury that a defendant is under no obligation to testify in his own behalf and that his neglect to testify shall not raise any presumption against him" (T. of R. p. 94; R. p. 145).

"The Jury are instructed that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the Jury in this case, as in all criminal cases; and it is the duty of the Jury to give the defendant in this case full benefit of this presumption and to acquit the defendant unless the evidence in this case convinces them of his guilt as charged, beyond all reasonable doubt" (T. of R. p. 94; R. p. 147).

"The Court instructs the Jury that the defendant is presumed to be innocent until proven guilty beyond all reasonable doubt. This presumption is not to be lightly set aside by you, but you should give the benefit of this presumption to the defendant at all times. The indictment in this case is not to be considered by you as evidence. Nor are you to enter the case with the feeling that unless the defendant were guilty, he would not have been indicted, because to do so would deprive the defendant of the benefit of the presumption of innocence which the law gives him" (T. of R. p. 96; R. p. 154).

"The Court instructs the Jury that the burden of proving, beyond all reasonable doubt, every material allegation necessary to establish the defendant's guilt, rests upon the government throughout the trial and the burden of proof never shifts to the defendant" (T. of R. p. 95; R. p. 149).

"The Court instructs the Jury that you have no right to presume that a tire was a new tire simply because it has been referred to as a new tire by a witness. In this case when the word 'new' is used, it means a tire which has been driven less than one thousand miles, and the burden of proving beyond all reasonable doubt that the tires were new is upon the Government. If you have a reasonable doubt as to whether the tires were new or used, then you must return a verdict for the defendant" (T. of R. p. 95; R. p. 152).

"The Court instructs the Jury that if after you have heard all the testimony that the conviction of the defendant depends upon the evidence of Roy W. Jones, William Lucker and Wayne Hanselman, and you cannot say whether their evidence was given because of duress of fear of punishment so that you cannot say beyond a reasonable doubt after considering all the evidence that their evidence is true, then you must find the defendant not guilty" (T. of R. p. 96; R. p. 155).

3. **The Court invaded the province of the jury.**

It was reversible error to give the jury instructions which tended to coerce their verdict.

A consideration of the court's instructions to the Jury discloses that the charge contained in the indictment and the evidence submitted in regard to the charges therein contained, were misinterpreted by the trial court, when the Jury was instructed as follows:

"* * * there is but one issue in this case. It is a rather narrow one, that is, whether the defendant sold tires without requiring the surrender of rationing certificates. That's the only issue which is before you, and, as a matter of fact, if he did, he is guilty. If he did not, he is not guilty."

"The regulations, which have the effect of law, governing this matter and which are relied upon in the

indictment are two sections. The first provides that no person shall sell or transfer a rationed commodity except by compliance with the provisions of the rationing regulations. Tires are a rationed commodity, and it is charged in the indictment that this defendant did violate the provisions of the law by selling and transferring a rationed commodity, namely, tires without complying with the provisions of the rationing regulations.

"The other provision of the regulations involved is that no person shall make a transfer of any tire except by compliance with the rationing regulations" (T. of R. 71, R. 124).

"It is charged under these two sections that this defendant at various dates in 1944, sold various rationed tires without complying with the laws and regulations, namely, without requiring that the persons to whom he sold such tires should deliver to him rationing certificates permitting the purchase of the tires. This is the charge in this case."

"Something has been said about amendment to the regulations. There has been no amendment which bears upon this issue. The Office of Price Administration on the 28th day of August, 1943, did enter a regulation permitting, without certificate, the transfer of used tires to a dealer or manufacturer. There is no transfer to a dealer or manufacturer; consequently, that amendment has no application. Then, on September 28, 1942, the Office of Price Administration amended the regulation to provide that any person may transfer used solid tires, used implement tires and used tractor tires. No such tires are involved here; so neither of these amendments has any bearing whatsoever on the issue confronting you" (T. of R. 61; R. 125).

By virtue of the Court's instructions as set out above, the Jury was compelled to find the defendant guilty if they found that he sold tires of any type.

We respectfully submit that the court invaded the province of the Jury when the Court instructed the Jury that

the tires allegedly sold by the defendant were not of the type covered by Ration Order 1-A, and the amendments thereto, when the Court stated, "Consequently that amendment has no application . . . No such tires are involved here; so neither of these amendments has any bearing whatsoever on the issue confronting you" (T. of R. 71; R. 125). This part of the court's instruction was plainly coercive, and took from the jury the determination of an essential fact which only the Jury could decide. This was reversible error.

We further submit, in this same regard, that the court erred in this part of its charges: ". . . the question is, did he violate the law, did he sell the tires without requiring a certificate issued by the ration board. All of these witnesses have told you these were new tires, and so far as this record is concerned that stands uncontradicted. They were grade 1 tires. We are not so much interested in what grade the tires were, but we are interested in whether the tires were sold without requiring the certificates which were necessary."

It was a question for the Jury to decide as to whether or not the tires allegedly sold by the defendant violated the regulations set up by the controlling governmental agency. The Court decided, and so instructed the Jury, that the tires allegedly sold by the defendant did violate the regulations set up by the controlling governmental agency. The regulations exempt certain tires which could be sold without requiring ration certificates. It was for the jury to decide whether the tires allegedly sold by defendant-appellant fell within the exception.

These two propositions are clearly inconsistent with each other, and destroy the application of the doctrine of reasonable doubt. On this theory we cite Sallinger v. U. S., 23 Fed. (2d) 48, 52 (C. C. A. 8); Karchmer v. U. S., 61 Fed. (2d) 623; Gold v. U. S., 26 Fed. (2d) 16, 32 (C. C. A. 8); Mazurosky v. U. S., 100 Fed. (2d) 958, 961 (C. C. A. 9).

4. **The court admitted evidence which was at variance with the allegations of the indictment.**

The court erred in admitting into evidence the tires, allegedly sold by defendant-appellant to all of the Government witnesses (except John Pierceall, who testified as an expert witness for the Government).

Each of the above witnesses testified for the Government that the tires alleged to have been sold to them, and each of them, were "new" tires. Each of these witnesses were by occupation farmers and had no greater experience, relating to tires, than the average individual. Defendant-appellant's objection to their testimony on this point should have been sustained; whether the tires were new or not, in so far as these witnesses were concerned, was a conclusion drawn by them from their limited experience, and not as defined by the O. P. A. regulations.

Williams v. U. S., 140 Fed. (2d) 351;
U. S. v. S. B. Penick and Co., 136 Fed. (2d) 413;
U. S. v. San Francisco Electrical Contractors, 57 Fed. Supp. 57.

5. **The court erroneously admitted evidence by permitting lay witnesses to testify that tires were "new" as part of the proof of an offense against the ration regulations.**

The word "new" and the proof relating to whether the tires were "new" should have been. In accordance with the definitions set forth by the Office of Price Administration the word "new" was defined as follows:

O. P. A. Definition.

1315.201 (19) "**'New'** as applied to tires and tubes means a tire or tube that has been used less than one thousand miles."

None of the witnesses testifying for the Government, including the filling station attendant who qualified as an expert because of the fact that he had checked tires for the Office of Price Administration, attempted to state an opinion as to whether or not the tires which they had purchased or which were exhibits in the case had been used less than one thousand miles or more than one thousand miles. The prosecuting attorney and the witnesses used the term "new" in its ordinary accepted sense and not in the sense in which it is used in the ration regulation.

Further Definitions.

Likewise, the Office of Price Administration defined "Grade 1" as follows:

1315.201 (11) " 'Grade 1,' as applied to tires, means a new passenger type tire."

The Court Refused to So Instruct the Jury.

The trial court tried the case upon the theory that local ration boards were the only persons who might issue ration certificates and so instructed the jury. The Office of Price Administration defined a ration board as follows:

1315.201 Sub. Par. (2) " **'Board'** means War Price and Ration Board established by the Office of Price Administration or a plant area board established by the Office of Price Administration and designated by it to serve the workers and specified industry and extravation establishments."

The Trial Court Refused to So Instruct the Jury.

1315.201 (5) " **'Certificate,'** unless the context requires otherwise, means a certificate issued by a board or other person or agency designated by the Office of Price Administration, authorized the issuance of any tires, tubes, recapping service or camel back."

The defendant tendered an instruction defining the word "new" in the language of the ration regulations (T. of R. p. 95). This instruction was refused. The defendant requested the court to instruct the jury what constitutes "new" and "used" tires in the language of the ration regulation, but the court refused (T. of R. p. 76).

> "Mr. Tate: I would like to have the court instruct the jury what constitutes new and used tires in the language of the O. P. A. regulations.
>
> "The Court: In view of the evidence and the fact that evidence is undisputed that each and every one of these tires were new when transferred, I shall not do that.
>
> "Mr. Tate: I would like to have the court instruct the jury as to the meaning of the word 'vehicle.'
>
> "The Court: Do you want me to go through the A, B, C's?
>
> "Mr. Tate: The only way the jury can understand the regulations is to be instructed as to the definitions used by the O. P. A.
>
> "The Court: I think everything has been told them that they are interested in.
>
> "Everybody will leave the court room. When you have arrived at a verdict, you will sign it and let me know and then you will deliver it in open court."

Thus the jury was coerced not only in the language of the court but by its actions in compelling the jurors to remain in the jury box, thus intimating the court did not feel that the case merited too much consideration.

It Is Therefore Respectfully Submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decisions.

ARLIE COX,

By ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.

(22)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

FRED RAMBO,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

No. 1127

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit,

and

BRIEF IN SUPPORT THEREOF.

ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Textbooks Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

FRED RAMBO,
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No. .....

PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for writ of certiorari from the Circuit Court of Appeals for the Seventh Circuit. The defendant, Rambo, was a farmer living at Monticello, Illinois. He

was indicted by the federal grand jury in the District Court of the United States for the Eastern District of Illinois, at Danville, Illinois, on the 7th day of September, A. D. 1944. The indictment consists of two counts. The first count was drawn the same as the first count of the Cox indictment, except that it charged a transfer of one Grade 1 automobile tire to one John McGuire. The second count is the same as the fourth in the Cox indictment, in that it charges a violation of the same Ration Order and differs only in the number of tires sold and the individual to whom the said tires were sold. The indictment charged the defendant with violation of Section 1315.801 of Ration Order No. 1A issued November 6, 1942, by the administrator of the Office of Price Administration under the authority conferred upon him pursuant to the provisions of Section 633, Title 50, App. U. S. Code, and Section 2.8 of General Ration Order No. 8 issued March 25, 1943, effective April 15, 1943, by the Office of Price Administration which was then and there an agency of the United States of America and empowered to issue said Ration Order No. 8 pursuant to Executive Order No. 9125, directive No. 3, issued by the Secretary of Agriculture under and pursuant to the provisions of Section 2 (a) (8) of the Second War Powers Act of 1942, Title 50 App. Section 633, U. S. Code.

2.

THE PROCEEDINGS IN THE TRIAL COURT.

The indictment consists of two counts. The first count charges the petitioner, Fred Rambo, with a violation of Section 1315.801 of Ration Order 1A, issued November 6, 1943, by the Administrator of the Office of Price Administration under the authority conferred upon him pursuant to the provisions of Section 633, Title 50, App. U. S. Code, and the second and last count charges the petitioner, Fred Rambo, with a violation of Section 2.8 of

General Ration Order No. 8, issued March 25, 1943, effective April 15, 1943, by the Office of Price Administration, which was then and there an agency of the United States of America and authorized to issue said Ration Order No. 8, pursuant to Executive Order No. 9125, Directive No. 1 of the War Production Board, and Food Directive No. 3, issued by the Secretary of Agriculture under and pursuant to the powers of Section 2 (a) (8) of the Second War Powers Act of 1942, Title 50, App. Section 633, U. S. Code.

A trial was had and the Jury convicted the petitioner on all counts.

The first count in the indictment charges, in substance, that Fred Rambo did willfully and knowingly make a transfer to John McGuire of a certain new tire, bearing Serial No. 11045713, said transfer not being pursuant to the provisions of Ration Order No. 1A or an order, authorization or regulation issued by the War Production Board.

The second count in the indictment charges, in substance that Fred Rambo did willfully and knowingly on or about the 29th day of June, A. D. 1944, sell to one Allan Keith Forcum a certain rationed commodity, to wit: two 650 x 16 Goodyear automobile tires bearing Serial Numbers 779LC320 and 9H6Z8830 not pursuant to or in accordance with the provisions of a ration order therefor, the said defendant then and there well knowing that he had not acquired said rationed commodities in accordance with the rules and regulations issued by the Office of Price Administration and was without right and authority to sell the same.

Fred Rambo entered a Plea of Not Guilty to the indictment.

Plea of Not Guilty Withdrawn and a Motion to Quash the Indictment made October 2, 1944.

On the same day Motion to Compel United States Attorney to Elect was made.

On October 3, A. D. 1944, the court overruled the Motion to Quash Indictment and denied the Motion to Compel United States Attorney to Elect.

Fred Rambo entered his Plea of Not Guilty on the 11th day of October, 1944.

The jury was empaneled to try this case and on the same day, before the Jury heretofore empaneled, the trial commenced.

At the conclusion of the evidence the petitioner, Fred Rambo, moved for a directed verdict, which was denied and to which ruling of the court, the petitioner, by his counsel, duly excepted.

The court then instructed the jury.

The Judge ordered the Jury to remain in the court room and ordered the court room cleared, not permitting the Jury to retire. Rambo was sentenced to a six months' imprisonment and fined Five Hundred Dollars and costs. From which judgment and sentence he files this petition for writ of certiorari.

Thereafter, on the 14th day of October, A. D. 1944, petitioner filed his Motion in Arrest of Judgment.

Thereafter, on the same day petitioner filed his Motion for New Trial.

Thereafter, on the 18th day of October, 1944, Motion in Arrest of Judgment and Motion for a New Trial was overruled, to which said rulings of the court, the petitioner, by counsel, duly excepted.

3.

THE EVIDENCE AND TRIAL.

Fred Rambo was shown by the evidence to be a farmer or livestock dealer living near Monticello, Illinois. All of the witnesses testifying for the government were farmers. All of them testified that they owned farm implements, trucks and tractors. The evidence showed that all of the witnesses who testified on behalf of the government had been previously indicted by the United States Grand Jury for the Eastern District of Illinois, had been arraigned and pleaded guilty and paid a fine. The ration regulations in force at the time of the alleged offense prohibited the transfer of "new" Grade 1 automobile tires.

Throughout the reception of the evidence and the instructions to the jury the Court and witnesses used the word **"new"** with reference to the tires in its ordinary accepted English meaning.

The word **"new"** as defined by the Office of Price Administration was as follows:

> **1315.201 (19) "New" as applied to tires and tubes means a tire or tube that has been used less than One Thousand Miles.**

Plaintiff's counsel offered to tender an instruction to the jury defining the word "new" in the language of the Office of Price Administration, but this court refused. Likewise, the Circuit Court of Appeals in its decision has considered the word "new" in a similar manner.

In the reception of the evidence several tires were received which bore numbers and designations at variance without the numbers written on the tires (T. of R. p. 75).

The District Court and Circuit Court of Appeals have held that this variance was not a substantial variance.

We contend that it was a substantial variance, because if the situation were reversed a citizen attempting to obtain tires from the Office of Price Administration would be bound by the numbers on the tires which he had on his automobile.

The court in his instructions to the jury refused to define what constitutes "wilful" violation of the ration regulations. The indictment alleged and the regulations required a "wilful and knowing" violation. The court invaded the province of the jury by narrowing the issue to a question of whether or not there had been a sale of tires without ration certificates, entirely omitting the requirement that the violation be a wilful knowing violation.

4.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under Section 240A of the Judicial Code (28 USC 347). The Circuit Court of Appeals has in this case decided federal questions which have not been and should be settled by this court. [Sup. Court Rule 38 (5) (B) as amended by the Act of February 13, 1925.] Judgment was entered in this case by the United States Circuit Court of Appeals for the Seventh Circuit on March 5, 1945.

5.

QUESTIONS PRESENTED.

1. The first question presented is sufficiency of the indictment. We refer to the general rule that an indictment need not negative exceptions unless the statute or regulations are so drawn that it is necessary to do so in order to state an offense.

2. The second question presented is whether the defendant was deprived of a fair and impartial trial or whether

the court so violated the federal rules or criminal procedure by admitting evidence at variance with the allegations of the indictment over the objection at variance to the indictment and the evidence and that the defendant was deprived of a fair and impartial trial.

3. The third question presented involves a question which has not been decided by this court in connection with rationing regulations which should be decided, namely, what constitutes a wilful and knowing violation of ration regulations? The word "wilful" is used in a great many statutes and has been considered by the Court in connection with income tax violations, postal violations and many other, but no decision of this court has been rendered in connection with the term "wilful and knowing" violation as used in the ration regulations.

4. The fourth question presented is whether the trial court and Circuit Court of Appeals correctly instructed the jury as to what constitutes a variance, that is a substantial variance?

5. The fifth question presented is whether the trial court erred in expressing his opinion as to the evidence and whether he invaded the province of the jury in so doing.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A substantial federal question presents itself with respect to the use of the term "wilful and knowing" violation of ration regulations. This question has not been heretofore determined by this court.

So far as petitioner is informed, this case presents for the first time the question as to whether a district court may determine as a question of law whether there is a wilful and knowing violation of ration regulations, or whether it remains a fact for the jury to determine.

This court has held in Murdock v. U. S., 290 U. S. 389-398, 78 L. Ed. 381-387, that wilfulness implied not only the knowledge of a thing, but a determination with a bad intention to omit doing it.

The provisions of the ration regulations require that there be a wilful and knowing violation in order to base a prosecution. The word "wilful" in the ration regulations assumes peculiar importance because of the fact that ration regulations are subject to so many changes. The grades of tires, the kinds of tires, the sizes of tires, the construction of tires and all of the various features of the tires are subject to regulations and thousands of regulations are issued concerning these. Then, too, General Order No. 8, which is alleged in the last counts of the indictment, invokes not only rationed tires, but many other products. Inasmuch as citizens generally acquire knowledge or ration regulations solely from newspapers and radio publicity and inasmuch as it is presumed that citizens have knowledge of the ration regulations, it is important in criminal trials that the jury be accurately and correctly instructed. For instance, one ration regulation provides that automobiles shall not be driven faster than thirty-five miles per hour, excepting in certain instances, and a penitentiary offense is provided in the event such regulation is violated, it can readily be seen that there might be a violation of such regulation on many occasions without the same being wilful.

The word "wilful" is used in so many instances in the statute that it is important to all the people that its use in the ration regulations be defined and determined, otherwise there may be a multiplicity of criminal prosecutions which are unfounded and many persons Congress never intended to be indicted might still be subject to indictment, although it is important to the American people generally that the high regard which has been held for the government be preserved rather than undermined by having all the people at all times subject to criminal prosecution for

acts which might and do occur every day in connection with ration regulations. If the court would by judicial determination define the term "wilful" in a limited way there would be a greater safeguard for American liberty.

Another reason relied upon for the granting of writ of certiorari is the conducting of the case by the trial court both in instructions and in the reception of evidence. The trial court invaded the province of the jury and misconstrued the ration regulations and he refused to instruct the jury as to the meaning of the ration regulations and at the hearing before the Circuit Court of Appeals admitted that he did not know what were the regulations. The trial court likewise erroneously refused to quash the indictment. There are many other reasons in support of the general rule of law that the government is not compelled to allege exceptions or negative exceptions in an ordinary indictment. But in a case such as this, the government is in a much favorable position to prove that the articles were not within the exceptions than is the defendant. The government is in exactly the same position in a ration regulation as it was in the enforcement of the laws relating to the transportation of gold and gold products, and in Fuller v. United States, 114 Fed. (2d) 698, it was held that certain gold products should be negatived in the indictment. Rubber products should be no different than gold products.

As was said by this Honorable Court in Yakus v. United States of America, decided March 27, 1944, and appearing in 88 L. Ed. 653:

> "It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial."

We submit that several questions have been raised in this criminal trial which ought to be decided by this court, and while we recognize that the court is overburdened with work at the present time, we believe it is important to all persons that the questions raised in this petition be decided by this Honorable Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 8707, The United States of America, Plaintiff-Appellee, v. Fred Rambo, Defendant-Appellant," to the end that this cause may be remanded and determined by this court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals for the Seventh Circuit be reversed by this court, and have such further relief as to the court may seem proper.

Dated April 2, 1945.

FRED RAMBO,

By ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

FRED RAMBO,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF

In Support of Petition for Writ of Certiorari.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals has not yet been reported but was decided on March 5, 1945.

JURISDICTION.

1. The date of the judgment to be reviewed is March 5, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Section 240A of the Judicial Code (28 U. S. C. 347).

STATEMENT OF THE CASE.

A statement of the case has already been made in the preceding petition which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

1. The court erred in holding the indictment sufficient.

2. The district court erred in the reception of evidence and instructions to the jury.

3. The court specifically erred in failing to define a "wilful" violation of a ration regulation and instructed the jury that a case is made out by simply proving a violation.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A.

The Indictment Is Insufficient to Charge a Violation of Federal Law.

1. The regulations of the Office of Price Administration are changed from time to time, from day to day. A presumption that the accused knows the regulations are different than a presumption that an alleged violation was wilful and knowing more than knowledge of the regulation is required to make a wilful violation. "**The law under which one accused and tried for crime should be fixed and uniform in such fashion and with such permanency as to be known and understood by the Courts and the members of the profession,** and courts of last resort should not vacillate in their determination so as to change in the absence of impelling legal reasons. To be punishable as a crime the act must be a crime at the time of the act and at the time it is sought to punish therefore, and if not a crime at both times it is not punishable as a crime."

22 C. J. S., pp. 66, 67, Sec. 17.

2. When a federal criminal law is repealed the prosecution must cease.

Green v. United States, 67 F. (2d) 846;
22 C. J. S., Sec. 27, p. 80.

3. The objection that the complaint or indictment did not state an offense was first raised in the district court or trial court, next in the Circuit Court of Appeals, and now in this Court. Such questions may be raised at any time even on appeal for the first time.

Zoline, Federal Criminal Law & Procedure, Sec. 422, Note 2;

Wiborg v. United States, 163 U. S. 632, 41 Law. Ed. 289, 298;
Weems v. United States, 217 U. S. 349-362, 54 Law. Ed. 793-796, 30 Sup. Ct. Rep. 544.

"There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute. United States v. Lacher, 134 U. S. 624, 628, 33 L. Ed. 1080, 1083, 10 Sup. Ct. Rep. 625. In United States v. Chase, 135 U. S. 255, 34 L. Ed. 117, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649, the indictment was under Par. 1 of the Act of July 12, 1876, Chap. 186, 19 Stat., at l. 90, Comp. Stat., Par. 10,381, declaring "every . . . book, pamphlet, picture, paper, writing, print or other publication of an indecent character" to be unmailable, and making their deposit in the mails an offense. The question was whether to send an obscene letter by mail violated that section. The court held that the letter was not a writing within the meaning of the statute. It said (p. 261): "We recognize the value of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed by the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

71 Law. Ed., pp. 445, 446.

4. **The indictment does not negative any exceptions such as were contained in the ration regulations from time to time.** This defendant is a farmer. He was shown by the evidence without dispute to have sold farm tires, or truck tires, or implement tires. Used truck and implement tires

were excepted from rationing. No offense was alleged in th indictment without negativing these exceptions.

5. The court erred in not sustaining the motion of defendant-petitioner to quash the indictment in this cause, and each and every count thereof. The indictment does not charge a criminal offense of any kind or character.

Hammer v. U. S., 134 F. (2d) 592;
Burton v. U. S., 202 U. S. 344;
Fuller v. United States, 114 F. (2d) 698;
U. S. v. Wills, 36 Fed. (2d) 855.

This rule has been consistently followed and is now well established law.

Reing v. United States ex rel. Girard, 84 F. (2d) 624;
Walkner v. United States, 79 F. (2d) 269;
Stetson v. United States, 257 Fed. 689;
United States v. Moore, 11 Fed. 689;
United States v. Mandelsohn, 32 F. Supp. 622;
United States v. Union Pac. R. Co., 20 F. Supp. 665.

6. A situation relating to the rule requiring the negativing of exceptions where a license or permit to do an act is required and similar to the case at bar prevailed in Fuller v. United States, 114 Fed. (2d) 698, where the Court stated:

"Actually the Gold Reserve Act of 1934 and regulations thereunder permit certain acquisitions and transportations—among other, the acquisition and transportation of fabricated gold, metals, containing gold, unmelted gold in its natural state—without the necessity of obtaining or holding any license therefor. And ordinarily, when licenses are required, they may be and are issued by the United States assay office at New York. Hence, an acquisition or transportation of gold without and not in pursuance of, a license issued by the Secretary of the Treasury does not violate the

Act or any regulation thereunder unless such acquisition or transportation is one for which a license is required and for which no license has been issued by a United States mint or by the United States assay office at New York."

Point B.

The Defendant Was Deprived of a Fair and Impartial Trial for the Three Reasons as Follows:

1. **The Court erroneously instructed the jury.**

"Wilfulness, as used in a criminal statute, means the doing or omitting to do a thing knowingly and wilfully. It implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it."

Potter v. United States, 155 U. S. 438, 446, 39 L. ed. 214, 217, 15 S. Ct. 144;
Felton v. United States, 96 U. S. 699, 702, 24 L. ed. 875, 876;
Spurr v. United States, 174 U. S. 734, 43 L. Ed. 1152, 19 S. Ct. 812;
Murdock v. United States (C. C. A. 7th), 62 F. (2d) 926, reversed in U. S. v. Murdock, 290 U. S. 389-398, 78 Law Ed. 281-287.

"Accused is entitled to an instruction enlightening the jury upon the subject of wilfulness and advising it that it should consider the good faith or honest belief, if any, of the defendant, in determining whether his conduct was wilful."

Potter v. United States, 155 U. S. 446, 39 L. Ed. 217, 15 S. Ct. 144.

"Whether guilty or innocent, the defendant has the right to a fair and impartial trial. He is entitled to have the jury properly and correctly instructed upon the law.

The law does not provide one method for trying innocent persons and another for trying guilty persons."

People v. Garines, 314 Ill. 413, 145 N. E. 699;
People v. Gardiner, 303 Ill. 204, 135 N. E. 422;
People v. Newman, 261 Ill. 11, 103 N. E. 589.

"An accused is entitled to be tried by an impartial and fair judge who shall maintain his role of Judge and not assume that of prosecutor."

U. S. v. Laudani, 134 F. (2d) 847;
U. S. v. Domres, 142 F. (2d) 477;
U. S. v. Hoffman, 137 F. (2d) 416;
Hall v. U. S., 150 U. S. 76.

In the Hoffman case cited above it is held "in prosecution for wilfully failing to report for induction into army at time and place fixed in notice, the assiduity of trial judge in securing a conviction required that defendant be granted a new trial."

In the Domres case, also cited above in this connection, the Court held that "an accused is entitled to be tried by an impartial and fair Judge, who shall maintain his role of judge and not assume that of prosecutor."

In the Laudani case cited above it is held that "the presiding Judge, by declining to interpose, notwithstanding defendant's protest against proper argument, gave the jury to understand that they might properly be influenced by it, and thereby committed error manifestly tending to prejudice defendant with jury, and was a proper subject of exception, and would have required a new trial if insufficiency of indictments had not put an end to the prosecution."

The attitude of the Court, in the instant case, became manifest early in the trial. The District Attorney referred, in his opening statement to the jury, to the violation with which the defendant-appellant was charged as

"Black Market." The court overruled the objection, stating: "It is a matter for the Jury. If a man does violate the regulations here he might be engaged in black market. It may stand for the present. If I find at a later time that the evidence doesn't bear that out, it may be stricken." This remark was not subsequently stricken (T. of R. 15; R. 30).

While counsel for defendant-appellant was making his opening statement to the jury, he said, "These witnesses were living in fear." The District Attorney objected to the statement and the court stated: "Sustained and the remark will be stricken from the record, and if counsel persists in such remarks, I shall have to punish him for contempt of court" (T. of R. 16; R. 32).

In the Court's charge to the Jury, the court not only undertook to instruct the Jury on questions of the law, but attempted to summarize the evidence. In the summary made by the Court questions of fact which were solely within the province of the jury to decide were decided by the Judge.

In criminal cases, the court must instruct the jury on all the essential questions of law, whether requested or not.

The Court erred in refusing to charge the jury with the following instructions requested by defendant-appellant:

> "The Court instructs the Jury that under Ration Order 1-A and the Amendments thereto, you must find the defendant not guilty if you find from evidence that the tires which were alleged to have been sold were either of the following:
>
> (a) Used solid tires.
> (b) Used implement tires.
> (c) Used tractor tires.
>
> "By virtue of an amendment to the regulation issued on the 28th day of September, 1943, the Office of Price Administration released from rationing these tires to encourage the full use of used tires of the character mentioned" (T. of R. 94; R. 144).

The holding in the case of U. S. v. Pepper Brothers, 142 Fed. (2d), would indicate that the law is that the amendments to the regulations set out in the indictment should have averred and not omitted.

2. **All of the following instructions tendered by the defendant were refused:**

"The court instructs the Jury that a defendant is under no obligation to testify in his own behalf and that his neglect to testify shall not raise any presumption against him" (T. of R. p. 94; R. p. 145).

"The Jury are instructed that the presumption of innocence is not a mere form to be disregarded by the Jury at pleasure, but it is an essential, substantial part of the law of the land, and binding upon the Jury in this case, as in all criminal cases; and it is the duty of the Jury to give the defendant in this case full benefit of this presumption and to acquit the defendant unless the evidence in this case convinces them of his guilt as charged, beyond all reasonable doubt" (T. of R. p. 94; R. p. 147).

"The Court instructs the Jury that the defendant is presumed to be innocent until proven guilty beyond all reasonable doubt. This presumption is not to be lightly set aside by you, but you should give the benefit of this presumption to the defendant at all times. The indictment in this case is not to be considered by you as evidence. Nor are you to enter the case with the feeling that unless the defendant were guilty, he would not have been indicted, because to do so would deprive the defendant of the benefit of the presumption of innocence which the law gives him" (T. of R. p. 96; R. p. 154).

"The Court instructs the jury that the burden of proving, beyond all reasonable doubt, every material allegation necessary to establish the defendant's guilt, rests upon the government throughout the trial and the burden of proof never shifts to the defendant" (T. of R. p. 95; R. p. 149).

"The Court instructs the Jury that you have no right to presume that a tire was a new tire simply because it has been referred to as a new tire by a witness. In this case when the word 'new' is used, it means a tire which has been driven less than One Thousand Miles, and the burden or proving beyond all reasonable doubt that the tires were new is upon the Government. If you have a reasonable doubt as to whether the tires were new or used, then you must return a verdict for the defendant" (T. of R. p. 95; R. p. 152).

"The Court instructs the Jury that if after you have heard all the testimony that the conviction of the defendant depends upon the evidence of Roy W. Jones, William Lucker and Wayne Hanselman, and you cannot say whether their evidence was given because of duress of fear of punishment so that you cannot say beyond a reasonable doubt after considering all the evidence that their evidence is true, then you must find the defendant not guilty" (T. of R. p. 96; R. p. 155).

3. **The Court invaded the province of the Jury.**

It was reversible error to give the jury instructions which tended to coerce their verdict.

A consideration of the court's instructions to the Jury discloses that the charge contained in the indictment and the evidence submitted in regard to the charges therein contained, were misinterpreted by the trial court, when the Jury was instructed as follows:

"* * * there is but one issue in this case. It is a rather narrow one, that is, whether the defendant sold tires without requiring the surrender of rationing certificates. That's the only issue which is before you, and, as a matter of fact, if he did, he is guilty. If he did not, he is not guilty."

"The regulations, which have the effect of law, governing this matter and which are relied upon in

the indictment are two sections. The first provides that no person shall sell or transfer a rationed commodity except by compliance with the provisions of the rationing regulations. Tires are a rationed commodity, and it is charged in the indictment that this defendant did violate the provisions of the law by selling and transferring a rationed commodity, namely, tires without complying with the provisions of the rationing regulations.

"The other provision of the regulations involved is that no person shall make a transfer of any tire except by compliance with the rationing regulations" (T. of R. 71; R. 124).

"It is charged under these two sections that this defendant, at various dates in 1944, sold various rationed tires without complying with the laws and regulations, namely, without requiring that the persons to whom he sold such tires should deliver to him rationing certificates permitting the purchase of the tires. This is the charge in this case."

"Something has been said about amendment to the regulations. There has been no amendment which bears upon this issue. The Office of Price Administration on the 28th day of August, 1943, did enter a regulation permitting, without certificate, the transfer of used tires to a dealer or manufacturer. There is no transfer to a dealer or manufacturer; consequently, that amendment has no application. Then, on September 28, 1942, the Office of Price Administration amended the regulation to provide that any person may transfer used solid tires, used implement tires and used tractor tires. No such tires are involved here; so neither of these amendments has any bearing whatsoever on the issue confronting you" (T. of R. 61; R. 125).

By virtue of the Court's instructions as set out above the Jury was compelled to find the defendant guilty if they found that he sold tires of any type.

We respectfully submit that the Court invaded the province of the Jury when the Court instructed the Jury that the tires allegedly sold by the defendant were not of the type covered by Ration Order 1-A, and the amendments thereto, when the Court stated, "Consequently that amendment has no application. . . . No such tires are involved here; so neither of these amendments has any bearing whatsoever on the issue confronting you" (T. of R. 71; R. 125). This part of the Court's instruction was plainly coercive, and took from the Jury the determination of an essential fact which only the Jury could decide. This was reversible error.

We further submit, in this same regard, that the Court erred in this part of its charge: ". . . the question is, did he violate the law, did he sell the tires without requiring a certificate issued by the ration board? All of these witnesses have told you these were new tires and so far as this record is concerned that stands uncontradicted. They were grade 1 tires. We are not so much interested in what grade the tires were, but we are interested in whether the tires were sold without requiring the certificates which were necessary" (T. of R. 75; R. 130). See the same authorities cited above.

It was a question for the Jury to decide as to whether or not the tires allegedly sold by the defendant violated the regulations set up by the controlling governmental agency. The Court decided, and so instructed the Jury, that the tires allegedly sold by the defendant did violate the regulations set up by the controlling governmental agency. The regulations exempt certain tires which could be sold without requiring ration certificates. It was for the jury to decide whether the tires allegedly sold by defendant-appellant fell within the exception.

These two propositions are clearly inconsistent with each other, and destroy the application of the doctrine of rea-

sonable doubt. On this theory we cite Sallinger v. U. S., 23 Fed. (2d) 48, 52 (C. C. A. 8); Karchmer v. U. S., 61 Fed. (2d) 623; Gold v. U. S., 36 Fed. (2d) 16, 32 (C. C. A. 8); Mazurosky v. U. S., 100 Fed. (2d) 958, 961 (C. C. A. 9).

4. **The Court admitted evidence which was at variance with the allegations of the indictment.**

The Court erred in admitting into evidence the tires, allegedly sold by defendant-appellant to all of the Government witnesses (except John Pierceall, who testified as an expert witness for the Government).

Each of the above witnesses testified for the Government that the tires alleged to have been sold them, and each of them, were "new" tires. Each of these witnesses were by occupation farmers and had no greater experience, relating to tires, than the average individual. Defendant-appellant's objection to their testimony on this point should have been sustained; whether the tires were new or not, in so far as these witnesses were concerned, was a conclusion drawn by them from their limited experience, and not as defined by O. P. A. regulations.

Williams v. U. S., 140 Fed. (2d) 351;
U. S. v. S. B. Penick and Co., 136 Fed. (2d) 413;
U. S. v. San Francisco Electrical Contractors, 57 Fed. Supp. 57.

5. **The Court erroneously admitted evidence by permitting lay witnesses to testify that tires were "new" as part of the proof of an offense against the ration regulations.**

The word "new" and the proof relating to whether the tires were "new" should have been. In accordance with the definitions set forth by the Office of Price Administration, the word "new" was defined as follows:

O. P. A. Definition.

1315.201 (19) " **'New'** as applied to tires and tubes means a tire or tube that has been used less than one thousand miles."

None of the witnesses testifying for the Government, including the filling station attendant who qualified as an expert because of the fact that he had checked tires for the Office of Price Administration, attempted to state an opinion as to whether or not the tires which they had purchased or which were exhibits in the case had been used less than one thousand miles or more than one thousand miles. The prosecuting attorney and the witnesses used the term "new" in its ordinary accepted sense and not in the sense in which it is used in the ration regulation.

Further Definitions.

Likewise the Office of Price Administration defined "Grade 1" as follows:

1315.201 (11) " 'Grade 1,' as applied to tires, means a new passenger type tire."

The Court Refused to So Instruct the Jury.

The trial court tried the case upon the theory that local ration boards were the only persons who might issue ration certificates and so instructed the jury. The Office of Price Administration defined a ration board as follows:

1315.201 Sub. Par. (2) " **'Board'** means War Price and Ration Board established by the Office of Price Administration or a plant area board established by the Office of Price Administration and designated by it to serve the workers and specified industry and extravation establishments."

The Trial Court Refused to So Instruct the Jury.

1315.201 (5) " **'Certificate,'** unless the context requires otherwise, means a certificate issued by a board or other person or agency designated by the Office of Price Administration, authorized the issuance of any tires, tubes, recapping service or camel back."

The defendant tendered an instruction defining the word "new" in the language of the ration regulations (T. of R. p. 95). This instruction was refused. The defendant requested the Court to instruct the jury what constitutes "new" and "used" tires in the language of the ration regulations, but the Court refused (T. of R. p. 76).

> "Mr. Tate: I would like to have the Court instruct the jury what constitutes new and used tires in the language of the O. P. A. regulations.
>
> "The Court: In view of the evidence and the fact that evidence is undisputed that each and every one of these tires were new when transferred, I shall not do that.
>
> "Mr. Tate: I would like to have the court instruct the jury as to the meaning of the word 'vehicle.'
>
> "The Court: Do you want me to go through the A, B, C's?
>
> "Mr. Tate: The only way the jury can understand the regulations is to be instructed as to the definitions used by the O. P. A.
>
> "The Court: I think everything has been told them that they are interested in.
>
> "Everybody will leave the court room. When you have arrived at a verdict, you will sign it and let me know and then you will deliver it in open court."

Thus the jury was coerced not only in the language of the Court but by its actions in compelling the jurors to remain in the jury box, thus intimating the Court did not feel that the case merited too much consideration.

It Is Therefore Respectfully Submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decisions.

FRED RAMBO,

By ASA S. CHAPMAN,
C. E. TATE,
Counsel for Petitioner.

INDEX

CITATIONS

641857—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1126

ARLIE COX, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1127

FRED RAMBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The appeals in these cases were heard together and were disposed of in one opinion in the circuit court of appeals (No. 1126, R. 153–156; No. 1127, R. 85–88), which is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered March 5, 1945 (No. 1126, R. 157; No. 1127, R. 89). The petitions for writs of certiorari were filed April 7, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictments charging petitioners with transfers of rationed tires in violation of the Second War Powers Act and ration orders issued by the Office of Price Administration, are insufficient because they failed specifically to negative an exception contained in a separate section of the tire ration order.

2. Whether, in their separate jury trials, petitioners were deprived of fair and impartial trials in that the court erred in admitting certain evidence and in instructing the juries.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177, 50 U. S. C. App., Supp. III, 633), provides in part:

(2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Ration Order No. 1A (7 F. R. 9160), issued by the Office of Price Administration on November 6, 1942, pursuant to the authority of Section

2 (a) (8) of the Act of June 28, 1940, as amended (*supra*), provided in pertinent part as of the date of the offenses involved here:

> § 1315.801 *Prohibitions.* (a) *General prohibition.* Notwithstanding the terms of any contract, agreement or other obligation, regardless of when made, no person, unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board, shall:
>
> (1) Make or offer to make, accept or offer to accept, or solicit a transfer of any tire or new tube; or
>
> (2) Use, alter, or change the physical location of any tire or new tube; or
>
> (3) Mount any tire or new tube upon a wheel or rim.
>
> * * * * *
>
> § 1315.806 * * *
>
> (p) *Transfer and use of non-rationed tires and tubes.* (1) Any person may, without certificate or authorization, transfer, acquire, mount, use, or change the physical location of the following tires and tubes:
>
> (i) New or used solid tires;
>
> (ii) Used tractor-implement tires;
>
> (iii) Grade III tires;
>
> (iv) New or used tubes;
>
> (v) Used industrial-type tires.
>
> (2) A consumer may acquire industrial-type tires or tubes for mounting and use on equipment only, without certificate or authorization.

(3) A dealer or manufacturer may transfer industrial-type tires or tubes to a dealer or consumer without certificate or authorization.

(4) The transfer and acquisition of tires or tubes under this paragraph is subject in all cases to, and may be made only in accordance with, the certification requirements imposed by §§ 4600.15 and 4600.17 of War Production Board Order R–1, as amended from time to time.

General Ration Order No. 8, issued March 25, 1943 (8 F. R. 3783), and prescribing general prohibitions and conditions applicable to all ration orders, provides in part:

§ 2.8 *Wrongful acquisition, possession, use or transfer of rationed commodity.* No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rationed commodity acquired in violation of a ration order.

STATEMENT

On September 7, 1944, indictments were returned in the United States District Court for the Eastern District of Illinois against petitioner Cox in six counts and against petitioner Rambo in two counts, charging violations of the Second War Powers Act. The first three counts of the Cox indictment charged that he wilfully and

knowingly transferred to named persons certain described new automobile tires, in violation of Section 1315.801 of Ration Order No. 1A, in that the transfers were not made in accordance with the provisions of that order. Counts 4, 5, and 6 alleged that Cox wilfully and knowingly sold to the same purchasers named in the first three counts a rationed commodity, namely, the same described new automobile tires, not in accordance with the provisions of a ration order, "well knowing that he had not acquired said rationed commodities in accordance with the rules and regulations issued by the Office of Price Administration and was without right and authority to sell the same," in violation of General Ration Order No. 8. (No. 1126, R. 2–6.) [1] The indictment against petitioner Rambo was based upon different transactions than those involved in the Cox case; count 1 charged an offense under Section 1315.801 of Ration Order No. 1A similar to the offenses alleged in the first three counts of the Cox indictment, and count 2 charged a violation of General Ration Order No. 8 similar to that alleged in

[1] There is no occasion in the Cox case to consider whether counts 4, 5, and 6, which are predicated on the same transactions as the first three counts but allege violations of a different ration order than that involved in those counts, charge offenses distinct from the offenses charged in those counts, for the judgment (*infra*, p. 7) is supported by the first three counts. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.

each of the last three counts of that indictment, but was based upon a different transaction than that involved in count 1 (No. 1127, R. 2–3). At their separate jury trials petitioners were convicted on all counts (No. 1126, R. 98; No. 1127, R. 35). Petitioner Cox was sentenced generally to imprisonment for one year and to pay a fine of one thousand dollars on counts 1 and 2; execution of a general consecutive sentence to imprisonment for one year on the remaining counts was suspended and he was admitted to probation for a period of three years, to commence after the sentence under counts 1 and 2 had been served (No. 1126, R. 113, 122). Petitioner Rambo was sentenced to imprisonment for six months and to pay a fine of five hundred dollars on count 1; execution of a consecutive sentence to imprisonment for six months on count 2 was suspended and he was placed on probation for three years to commence after the sentence upon count 1 had been served (No. 1127, R. 53, 57).

Upon appeals which were heard together and disposed of in a single opinion, the judgments were affirmed by the Circuit Court of Appeals for the Seventh Circuit (No. 1126, R. 153–157; No. 1127, R. 85–89).

While petitioners had separate jury trials, the pattern of the evidence showing illegal sales of tires to various purchasers in violation of the ration orders is the same. Thus, in the Rambo

case, John McGuire, the transferee named in count 1 of the indictment, testified that about August 1, 1944, Rambo met him on the street in Ivesdale, Illinois, and that Rambo said, "he heard I needed a tire, heard I blew out one and wanted to know if I would be interested in one and I said I could use one and I asked him the price and he said $45.00 and I said I would take one" (No. 1127, R. 11–12). Rambo drove away in his automobile and McGuire followed in his to a point about one mile from town, where Rambo took a tire from the trunk of his automobile and gave it to McGuire, who used it on his automobile (*id.*, p. 12). McGuire testified further that Rambo did not request "any evidence or authority from any ration board" authorizing him to acquire a tire and that he in fact had no such authorization (*id.*, p. 14); that he paid Rambo $45.00 for the tire (*id.*, p. 13); and that the tire was a "brand new" one (*id.*, pp. 13, 16). There was testimony of similar transactions by one other purchaser from Rambo (*id.*, pp. 20–23) and by five persons who had purchased tires from petitioner Cox (No. 1126, R. 16–21, 31–35, 41–46, 53–59, 60–62). Both petitioners rested without offering any evidence (R. 1126, R. 70; No. 1127, R. 27).

ARGUMENT

The contentions advanced in both petitions for certiorari are identical. In our view they are without merit.

1. Petitioners challenge (No. 1126, Pet. 7, 15–18; No. 1127, Pet. 6, 13–16) the sufficiency of the indictments on the ground that they do not specifically negative an exception contained in Section 1315.806 (p) of Ration Order No. 1A (*supra,* pp. 4–5), permitting the unrestricted transfer of certain tires other than new passenger car tires of the kind described in the indictments. Count 1 of the Rambo indictment and counts 1, 2, and 3 of the Cox indictment are expressly predicated on Section 1315.801 of the ration order, which prohibits, *inter alia,* the transfer of any tire "unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board" (*supra,* p. 4). These counts describe the tires involved as "new," "Grade 1" automobile tires and allege that they were transferred in violation of Section 1315.801. The remaining counts of the indictments are expressly predicated on Section 2.8 of General Ration Order No. 8, which proscribes the transfer (1) of any rationed commodity except in accordance with the provisions of a ration order and (2) of any rationed commodity acquired in violation of a ration order. These latter counts allege, *inter alia,* that the described tires were transferred "not pursuant to or in accordance with the provisions of a ration order." The counts based upon Section 1315.801 of Ration Order No. 1A implicitly refer to tires which are

not freely transferable under that order, in view of the allegation that the transfers were in violation of Section 1315.801; that allegation negatives any possibility that the tires were of the kind described in Section 1315.806 (p) as being transferable without authorization. The counts based upon Section 2.8 of General Ration Order No. 8 specifically allege that the tires involved in those counts were transferred in violation of "a ration order," which, in this case, necessarily refers to the tire ration order, No. 1A. Hence, in respect of all the counts, petitioners were fairly apprised that the tires involved were not of the kind described in Section 1315.806 (p) of Ration Order No. 1A. In any event, it is well settled "that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey* v. *United States,* 260 U. S. 353, 357. See also, *United States* v. *Cook,* 17 Wall. 168; *Seele* v. *United States,* 133 F. 2d 1015, 1019 (C. C. A. 8). Since the exception relied upon by petitioners is contained in a separate section of Ration Order No. 1A, and since it was within petitioners' knowledge whether the tires they transferred were of the kind described in Section

1315.806 (p) of that order, the exception made by that section was properly a matter for petitioners to raise as an affirmative defense; that exception is not so closely incorporated into the definition of the elements of the offense described in Section 1315.801 as to have required that the indictments specifically allege that the transfers were not within the exception.

2. Both petitioners broadly contend (No. 1126, Pet. 18–27; No. 1127, Pet. 16–25) that they were deprived of fair trials because of errors in the admission of evidence and in the court's charge to the jury in each case, but their specifications of errors relied upon show that the contentions are without substantial merit.

Petitioners complain that the court improperly permitted the purchasers of the tires to testify that they were "new" tires, apparently on the theory that the condition of the tires was a matter calling for expert knowledge. We agree with the court below (No. 1126, R. 155; No. 1127, R. 87) that the witnesses "having examined them and having long been familiar with automobile tires, were entitled to testify as to newness, and that testimony uncontradicted, with the jury's own observation of the tires, some of which were in court as exhibits, was entitled to whatever weight the jury chose to give it." Nor, contrary to petitioners' contention, was there any occasion for the court to instruct the juries that the ration

order defined "new" as applied to tires as meaning a tire that has been driven less than one thousand miles. Since the uncontroverted evidence showed that the tires were "new" in the commonly accepted meaning of that word, it was unnecessary to instruct the juries that even if the tires had been used for less than one thousand miles, they were subject to the ration order. Further, since none of the tires involved in either case was of the kind described in Section 1315.806 (p) of Ration Order No. 1A, the court did not err in declining to instruct the juries, as petitioners requested, to give consideration to that section or in specifically instructing the juries that the section did not bear upon the issues before them.

Read as a whole, the charge in each case fully and fairly covered the issues and did not invade the province of the jury, as petitioners contend. In the Rambo case, the judge summarized the allegations of the indictment and explained the nature of the offenses charged (No. 1127, R. 28). He then summarized all the evidence in the case and advised the jury that if petitioner intentionally sold rationed tires in violation of the ration orders, he was guilty of the offenses charged in the indictment (*id.*, p. 29). He further explained the presumption of innocence and the meaning of reasonable doubt and admonished

the jury that the fact that Rambo did not testify should "raise no presumption against him" (*id.*, p. 30). The charge in the Cox case followed substantially the same pattern (see No. 1126, R. 71–76). While the court did not, in this case, give as explicit an instruction in respect of the required intent as it did in the Rambo case, it did impress upon the jury the nature of the charges against Cox and the necessity for the jury to find that he "transferr[ed] rationed tires in violation of the ration laws" before they could convict him (*id.*, pp. 71, 72, 75). While the charge might have been more explicit in defining the element of intent, petitioner did not except to the charge in this respect or in any other manner afford the trial judge an opportunity to amplify the charge (see *id.*, p. 76). In these circumstances, we submit that the inadequacy of the charge in this respect does not merit further review by this Court. Cox could not have been prejudiced, for all the evidence in the case shows that he was engaged in the illegal sale of tires over a period of several months; that his sales were made in the secrecy that ordinarily accompanies conscious wrongdoing; and that the prices he received for the tires were so exorbitant as to compel the inference that he was purposefully violating the ration orders to reap a financial profit from the tire shortage. In short, there is no basis for the

jury to have found that Cox was an unwitting violator of the ration orders.[2]

CONCLUSION

Petitioners were properly convicted on undisputed evidence that they sold tires in violation of the ration orders. The cases present no question of general importance or conflict of decisions. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

HUGH B. COX,
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TOM C. CLARK,
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Attorneys.

APRIL 1945.

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[2] Petitioners' further complaints of the court's refusal to give additional instructions requested by them are without merit, either because the instructions requested were embodied in substance in the charges in chief or because they were irrelevant (No. 1126, compare Pet. 21–22 with R. 71–76; No. 1127, compare Pet. 19–20 with R. 28–31).

U. S. GOVERNMENT PRINTING OFFICE: 1945

Encl